Republic v Kadenge & 2 others (Criminal Case 21 of 2016) [2020] KEHC 1377 (KLR) (27 November 2020) (Judgment)

Republic v Chengo Kazungu Kadenge & 2 others [2020] eKLR

Neutral citation: [2020] KEHC 1377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE 21 OF 2016

RN NYAKUNDI, J

NOVEMBER 27, 2020

BETWEEN

REPUBLIC .... PROSECUTION

AND

CHENGO KAZUNGU KADENGE .... 1ST ACCUSED

SAFARI KOMBE KOI .... 2ND ACCUSED

KAHINDI SAFARI KOMBE .... 3RD ACCUSED

JUDGMENT

Representation

Ms. Sombo for the state

Mr. Gekanana for the accused

1. The accused persons Chengo Kazungu Kadenge, Safari Kombe Koi and Kahindi Safari Kombe are herein charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The brief particulars constituting the unlawful act with malice aforethought are that on the 8.12.2016 at Matsongoni village in Karimani Sub-location, Bandari, Ganze, within Kilifi County, jointly with others not before Court murdered Karisa Katoi Kani. Each of the accused pleaded not guilty and were represented at the trial by Mr. Gekanana, while Ms. Barbara, prosecution counsel appeared on behalf of the state.

3. In order to discharge both the evidential and legal burden of proof as illuminated in the case of Woolmington v DPP {1935} A. C. 462, the prosecution summoned and marshalled the evidence of their (7) seven witnesses. The same is summarized as hereinunder:

4. PW1 – Katana Katoi, testified as a sister to the deceased on the chain of events prior to the fatal assault inflicted by the accused persons on 8.12.2016. According to Katana Katoi, this happened when they were at the home of the third accused. In a little while some people started pointing a finger at the deceased under the pretext that he was suspected to have a hand in the sickness of the 3rd accused wife through witchcraft. As both of them tried to leave the third accused home some people including all the three accused persons initiated threats of violence.

5. The witness stated that the fourth accused armed himself with a stick and threw it against her and the deceased. Further the 2nd accused emerged armed with a club (rungu) which he used to hit the deceased on the head. According to the witness, it did not take long before the rest of the mob deserted the scene leaving the accused persons to persist in inflicting harm upon the deceased. On being shown some of the recovered pieces of wood, (PW1) was able to positively identify them as part of the assorted weapons used to assault the deceased.

6. During cross-examination by the defence counsel, (PW1) confirmed that the Assistant Chief had asked the deceased to visit the home of the third accused in order to undergo a cleansing ritual; as a primary goal to achieve the healing of the wife. She then described the chronology of acts done and calculated by the four accused persons varying degrees of assault.

7. PW2 – Katana Charo Kaingu testified that on 8.12.2016 the deceased had been held in suspicion of bewitching the third accused wife. That apprehension made the Assistant Chief ask him to escort the deceased to avoid threats to his life or injury by the family of the third accused. It was at the home of the third accused a cleansing ceremony took place involving a cup of water and the deceased pointing at the wife of the third accused uttering the following words "I have been told, I bewitched you, if that is true, may this water I have given you heal you." That became the reason PW2 told the Court that third accused started to assault the deceased. Simultaneously, other accused persons weighed in to punish the deceased for applying supernatural power against the wife of the third accused. Overall PW2 confirmed that the deceased died out of the injuries.

8. While being cross-examined by counsel, PW2 reiterated that the deeper underlying reasons for infliction of fatal injuries against the deceased by the accused persons was understood to be the suspicion of him being a witch. That he had used his magic charms to cause the death of the third accused wife.

9. PW3 – Dama Karisa Katoi, the wife to the deceased told the Court that on 8.12.2016 under instructions from the Chief of the area they had been asked to go to the home of the third accused to cleanse his wife, reported to be unwell. As the ceremony got underway PW3 explained that she left the third accused home for their home to get food for the deceased. Before going back to that home she heard screams, only to arrive and find the deceased had been assaulted to death. She however able to identify that the four accused persons were still at the scene continuing with the assault using some sticks in their possession.

10. PW4 – Stephen Juma Katana, a nephew to the deceased testified that on 8.12.2016 he happened to be at the home of the third accused. He stated that the wife was seated under a tree and about ten minutes of his arrival she passed away. He further testified that, he heard people talk about witchcraft and involvement of the deceased with the death of the wife to the third accused. What followed thereafter according to PW4 was a joint violent attack by the three accused persons upon the deceased who

allegedly was summoned to carry out a cleansing ceremony. This was meant to restore the health of the third accused wife. When that failed to happen (PW4) told the Court that accused persons acting in turns assaulted the deceased inflicting fatal injuries. He was able to positively identify some of the sticks exhibit 1, accused persons used to beat the deceased.

11. PW5 – Kahindi Karisa the son to the deceased testified and confirmed that on 8.12.2016 a letter came from Chief requiring him to attend a meeting at the third accused home. He accompanied the deceased to the home of the third accused so that he will conduct a cleansing ceremony over the ill-health of the third accused wife. PW5 pointed out that he left the third accused home but before long he heard screams and shouts from that same homestead, no sooner after he went back only to find the father (deceased) had been killed.

12. PW6 – Ronald Safari, the Chief of Ndemi Sub-location testified that on 7.12.2016 he received a complaint from the third accused in regard to his wife illness. The third accused demanded a meeting with the deceased because he suspected him to be responsible for the sickness through witchcraft. Thereafter on 8.12.2016 PW6 facilitated the meeting of both families, so that the cleansing ceremony could take place. Nevertheless, he received information that the wife of the third accused passed away inspite the cleansing ceremony having gone well without a hitch.

13. It is in the above context PW6 told the court accused persons revenged by killing the deceased. By the nature of this occurrence PW6 confirmed that the police station at Bamba was informed to visit the scene and collect the deceased body.

14. PW7 – CPL Stanley Maritim, testified that on receipt of the murder report they visited the scene under the directions and instructions of the O.C.S. Chief Inspector – Nzuki, indeed, on arrival PW7 told the Court that the deceased had suffered several multiple injuries to the head and back which appeared shattered. Further, PW7 testified that it was at the scene he recovered the alleged murder weapons identified as sticks by the witnesses. He produced them as exhibits in support of the charge. Based on documentation of the scene PW7 confirmed that photographs were taken of various views which later he processed and developed to be used as evidence in this trial. He therefore produced the set as exhibits 3 (a), (b), (c).

15. Another piece of evidence dealt by PW7 was on the process of the post-mortem examination carried out at Kilifi Hospital Mortuary by Dr. Bachu. It will thus be seen from PW7 testimony that both counsels had agreed to have the post-mortem exhibit 5 produced by consent without calling the maker. According to the positive findings, Dr. Bachu had found that the cause of death, was due to severe head injury consistent with blunt object targeted to the head.

16. At the end of the prosecution evidence all accused persons except the first accused who died during the pendency of the trial to answer the charge of murder contrary to Section 203 of the Penal Code.

17. As regards the 1st accused Kazungu Chengo defence, he denied any participation in committing the offence of murder against the deceased. According to his testimony the death of the deceased happened while he went about his normal duties. That very date and time being fronted by the prosecution as the day of the murder accused denied being at the scene.

18. The second accused Safari Kombe also in his unsworn statement denied the charge and any unlawful acts and omissions referred to by the prosecution witnesses. The secondary category of information the accused told the Court was in respect of the death of his wife. The accused further told the Court that within the village the deceased herein was suspected to have bewitched his wife and as a consequence she passed on. That is what necessitated the cleansing ceremony to remove the evil spell. Simultaneously the deceased was beaten as a suspected witch by a group of people.

19. The third accused Kahindi Kombe in his defence told the Court that on 8.12.2016 he spent most of the hours of the day at Bandari Secondary School. He explained that it was the same day he received information about the death of his mother – Taabu. This prompted him to travel home to avail himself the nature and cause of her death. According to the accused observations, the deceased in the instant case was lying next to his mother's body about three meters away. Similarly, like the other accused he denied any possibility of being involved with the murder as implied by the state witnesses.

20. These two forms of narratives by the state and defence frequently intersect and it is from this evidence I am required to find whether on matters of facts and Law, the charge has been proved beyond reasonable doubt.

Analysis and Determination

21. The accused persons are jointly charged under Section 203 of the Penal Code for committing homicide directly or indirectly which caused the death of the deceased. Generally, an accused person is held culpable of murder when he unlawfully and with malice aforethought causes the death of the deceased. In this connection the state has a duty to proof beyond reasonable doubt the following ingredients that:

    (1). The deceased Karisa Katoi Kani is dead.

    (2). That his death was through an unlawful act or acts of the accused persons.

    (3). That in causing death the accused persons unlawful acts were actuated with malice aforethought.

    (4). That the accused persons joint action satisfies beyond reasonable doubt the element of common intervention under Section 21 of the Penal Code.

    (5). That the accused persons were positively identified at the scene.

The standard of proof

22. The standard of proof plays a vital role in the process of both criminal and civil administration of justice. In criminal cases the scope of that standard is said to be that of beyond reasonable doubt. *The Constitution* of Kenya 2010 recognizes the right of presumption of innocence under Article 50 (2) (a) in no uncertain terms. Therefore, it requires the state through the office of the director of public prosecution in Article 157 (6) (10) and (11) of *the Constitution* to prove the charge beyond reasonable doubt. The notion of the burden of proof discourse is impliedly stated under the provisions of Section 107 (1) and 108 of the *Evidence Act*.

23. In the sense of the evidential burden it is the duty and obligation of the prosecution to lead evidence to show that the accused charged with the offence cannot claim the protection of the right to innocence. In Article 50 (2) (a) of *the Constitution*. Failure to produce primafacie evidence on existence or non-existence of facts in issue on criminal proceedings entitles the trial Court to either dismiss the charge or discharge and acquit the accused persons.

24. While on the other hand, if that burden of proof on primafacie case is discharged it is incumbent for the accused person to be called upon to answer the charge. A more fruitful refinement of the doctrine that makes sense is as propounded by Lord Denning in Miller v Minister of Pensions {1947} 2 ALL

ER 372 where he held as follows On the sufficiency of evidence to meet the standards for responsibility in the crime beyond reasonable doubt thus:

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course, it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."(See also Msembe & Another v R {2003} KLR 521 Modokaa v R {2000} KLR 411)

25. In the instant case the corpus of the evidence required of the prosecution is to proof the intention, causation and the effect that the deceased died and the accused persons are guilty of the murder. Further, the basis of proof requires facts or evidence which demonstrates that the accused persons happened to be at the scene to commit the crime in question. It cannot be speculative or conjecture type of evidence.

26. As its now, the duty of the Court is to evaluate the evidence into each component on both quality and quantum to show whether the prosecution was able to discharge the burden of proof beyond reasonable doubt. It is also not in dispute that he who alleges must prove. It is also clear that burden never shifts to the accused persons.

27. It was on this part of the definition that the charge was framed and evidence led to proof culpability of the accused persons where key issues for determination, consist of the following:

    (a). The death of the deceased

28. There is ample undisputed evidence that the deceased on the 7.12.2016 had gone to the Chief's office (PW7) in regard to a complaint made by the third accused with respect to his wife sickness and allegation of witchcraft by the deceased. It was agreed that the deceased undergoes a cleansing ceremony at the home of the third accused as correctly alluded to by PW1 – PW6 threads of evidence. There is clear primafacie evidence that the cleansing ritual took place as planned but soon thereafter the deceased was fatally assaulted on the material day of the 8.12.2016.

29. PW1 – PW6 – confirms both directly and circumstantially that the deceased received severe beatings from the accused persons. He died instantly at the scene of the violent attack. PW7 produced the post-mortem report filled by Dr. Bachu which confirmed that the deceased died from several injuries to the head. Therefore, without a shadow of a doubt the aforementioned witnesses are categorical as to the identity and the death of the deceased.

30. (b). The second element of inquiry is centered around causation and unlawful death of the deceased.

31. The test of blameworthiness here is for the prosecution to demonstrate by way of evidence that the accused played an active role or abetted, or aided in causing the death of the deceased. The question of causation requires the Court to ensure the state of facts which connects the accused persons to be responsible for causing a particular result in this case death. This Court is attracted to the discussion by G. Williams in his Text Book of Criminal Law 2nd Edition 1983 – pp 381 – 82 where the nature of the inquiry at the stage of determining legal causation certain guiding principles are taken to be sufficient:

> "When one has settled the question of but for causation the further test to be applied to the but – for cause in order to qualify it, for legal recognition, is not a test of causation but a

moral reaction. The question is whether the result can fairly be said to be imputable to the defendant. In the term cause must be used, it can best be distinguished. In this meaning as the imputable or responsible or blamable cause, to indicate the value Judgment involved. The word imputable is here chosen as best representing the idea. Whereas, the but- for cause can generally be demonstrated scientifically, no experiment can be devised to show that one of a number of concerning but for causes is more substantial or important than another, or that one person who is involved in the causal chain is more blameworthy than another, while causation is a distinct issue from mensrea, the proper standard of causation expresses an element of fault that is in Law sufficient, in addition to the requisite mental element to base criminal responsibility. The starting point in the chain of causation which seeks to attribute the prohibited consequences to an act of the accused is usually an unlawful act in itself when the unlawful act is contained with the requisite mental element for the offence charged, causation is generally not an issue. For example, in the case of murder, where an accused intends to kill a person and performs an act which causes or contributes to that person's death it is rare for an issue to arise as to whether the accused caused the victim's death."

32. Further to Section 213 of the Penal Code the above guidelines are the provisions in which provides that:

    (i). The death of the deceased need not be caused by the immediate act of an accused person

    (ii). or the act of the accused forces deceased to take evasive action which results in his death

    (iii). or act of accused hastens the death of the deceased

    (iv). or his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

> " the context, the collocation and the objects of the phrase relating to causation in murder cases. For example, the section provides that where a person causes bodily injury that is in itself dangerous and from which death results, that person causes the death notwithstanding that the immediate cause of death is proper or improper treatment."

33. Applying the above principles, the prosecution witnesses PW1 – PW6 supported a very clear narrative that the accused persons engaged the deceased in a physical altercation following a witchcraft cleansing ritual at the home of the third accused. The accused person gave the deceased a cup and water with a concoction which was to be used to heal or restore the wife of the third accused to life.

34. Despite the fact of administering the oath under this approach to suppress witchcraft all the same the third accused wife died. From the evidence the accused persons persisted in violent attacks against the deceased. As candidly confirmed by PW1 – PW4 the acts of violence involved use of hard sticks and clubs to inflict harm to the head within a few minutes the deceased succumbed to death.

35. The post-mortem by Dr. Bachu dated 17.12.2016 revealed that the deceased sustained multiple injuries – of deep cut wound on the frontal area – 2 cm, and 3 x 4 cm cut on the left parietal region 3 cm transverse which exposed deep brain matter. The head configuration had been distorted and hematoma on the left lateral thigh. According to Dr. Bachu, the only and contributing factor as to the cause of death was the severe head injury consistent with the blunt heavy object which hit the head.

36. It is immaterial that the deceased was not able to receive proper medical attention to ameliorate the impact of the serious injuries inflicted by the assailants. As noted the deceased death can be brought within the requirements of Section 213 of the Penal Code.

37. As previously explained by PW1, PW2, PW3 PW4, the degree of participation by the accused persons is based on direct acts of assault occasioning the serious injuries as confirmed during the post-mortem examination. The underlying offence before the murder was committed as stated by the prosecution witnesses relate to causing grievous harm in circumstances that the deceased bewitched the third accused wife.

In the case of Kabiru v Republic {2007} (EA 107) it was held that:

> " Motive is a factor to be taken into account as part of the circumstantial evidence on the culpability or otherwise of an accused."

38. Further, the Court of Appeal in Karukenya & 4 others v R {1987} KLR 458 it was held:

> " That evidence of motive is admissible and a matter to be considered together with all the other evidence."

39. The fundamental principle is that the Courts should intervene where culture and traditions are used as a defence or justification to commit the crime of murder against another human being. The combined efforts of the government and the powers of the Court to avert a human catastrophy can be understood in the decision by Griffin in Rex v Kumwaka 14 LR 1932 where he bracketed together the following passage:

> " It is also widely known, and as appears from the evidence in this case, that government does not tolerate the killing of witches. The plea has been frequently put forward in murder cases that the deceased had bewitched or threatened to bewitch the accused, and that plea has been consistently rejected except in cases where the accused has been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation has been held proved. The Courts to adopt any other attitude to such cases, would be to encourage the belief that an aggrieved party may take the Law into his own hands, and no belief could well have been more mischievous or fraught with great danger to public peace and tranquility."

40. What comes into play in certain aspects of this case as deduced from PW1 – PW4 testimonies, accused persons had formed a motive to cause harm against the deceased to revenge the death of the third accused wife. There is sufficient evidence that accused persons started to harass and intimidate the deceased from the time they went to report to the Chief of the area (PW6) on the need of a meeting between the 3rd accused and the deceased. This was meant to raise the issue of causation and ill health of the 3rd accused's wife. Unfortunately, as already stated by PW1 – PW5, the said wife died. On 8.12.2016, the essential and integral killing of the deceased commenced immediately after the death of the 3rd accused's wife. The increased degree of participation coupled with use of force establishes the import of causation and unlawful acts by each of the accused persons acting in concert to commit the murder. I take note of the various defences raised by each of the accused persons in responding to the question on how the deceased met his death.

41. In my view, the basis of the prosecution case on the charge is amply supported by the direct and indirect evidence of PW1, PW2, PW3, PW4 and PW5 on causation and unlawful acts of assault. This was a plain case. The assault took place respectively on 8.12.2016 on each occasion at Matsangoni

village, accused persons were known. The earlier report on witchcraft was made to the Chief (PW6) on 7.12.2016. On both occasions, the assailants who persisted in ensuring justice for the illness of the 3rd accused wife demanded to know why the deceased bewitched her. There can be no doubt that the damning evidence by the prosecution witnesses against the accused persons remained uncontroverted.

42. The facts and context of this case as evidence emerges leans towards the purported witchcraft by the deceased upon the 3rd accused wife. It is trite that under the doctrine of killing on provocation under Section 207 and 208 of the Penal Code, the accused person must demonstrate the following related defence elements:

    (a). That the act causing death must be proved to have been done in the heat of the passion, that is in anger, fear alone, even fear of immediate death, is not enough.

    (b). The victim must have been performing, in the presence of the accused, some act which the accused genuinely believed and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care.

    (c). A belief in witchcraft perse does not constitute a circumstance of excuse or mitigation for killing a person believe to be a witch or wizard when there is no immediate act of provocation.

    (d). The act of provocation must amount to a criminal offence under Criminal Law.

    (e). The provocation must be not only grave but sudden and the killing must have been done in the heat of passion. (See Eria Galikuwa v Rex {1951} 18 EACA 175).

43. I therefore agree with the above dictum that belief in sorcery is not a reasonable belief, so there can be no defence of fact as the basis for provocation and suspicion of witchcraft to kill the deceased by the accused persons. This Court being in the exalted position of a trial Court in murder cases has a right and obligation to speak firmly and to expand jurisprudence touching on belief in witchcraft as a justification to kill another human being, is not excusable.

44. Its evident that the social cultural structures on witchcraft believes as depicted in the instant case can result in the killing of the vulnerable aged men and women of this community. More so, older people, who are socially and economically disadvantaged and lack legal protection. They find themselves vulnerable when accused of witchcraft. The Judgment of the Court in R v John Gachogu & Another {2005} eKLR set the bar founded upon such believe in the existence witchcraft by stating as follows:

> " mere belief in witchcraft did not constitute a circumstance excuse, or mitigation for killing a person believed to be a witch."

45. In sum every measure of unlawfulness and omissions by the accused demonstrates beyond reasonable doubt that the deceased death was neither justified nor excusable.

(c). The element of malice aforethought.

46. In terms of Section 203 of the Penal Code, murder is the unlawful killing of a human being with malice aforethought with additional elements of willfulness, deliberation and pre-meditation for the commission of the crime.

47. The manifestation of malice aforethought is an enumerated under Section 206 of the Penal Code. It may be express or implied to prove any one or more of the following circumstances:

(a). An intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not.

(b). Knowledge that the act or omission cause the death of or grievous harm to some person. Whether such person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.

(c). Intent to commit a felony.

(d). Intention to facilitate the escape from custody of a person who has committed a felony.

In People v Robertson {2004} 34 Cal 4th 156 the Court held:

> " That malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."

48. The other cases have affirmed findings of express or implied malice from the nature of the weapons used, the gravity of the injuries and parts of the body targeted by the perpetrators. (Rex v Tubere S/o Ochen {1945} 12 EACA 63). From the case of Nzuki v R {1993} KLR

> " the prosecution has to prove an intention to cause death, intention to cause grievous bodily harm and if the accused knew that there was a serious risk that death or grievous harm could result or accused proceeded to do so without any lawful excuse."

49. As expressly stated under Section 206 (b) of the Penal Code knowledge that the unlawful act or omission will cause death imports the element of recklessness to malice aforethought. The prosecution by their information charged the accused persons with a single circumstance which makes them eligible for the death penalty. It is in regard to this criteria phrase that the Law stresses proof of malice aforethought beyond reasonable doubt. That statutory aggravating circumstances play a determinant factor which distinguishes murder from other homicides.

50. Related to the prior decisions cited elsewhere in this decision, guidance on this ingredient was given by Connecticut Chief Justice where he stated as follows:

> " In common speech malice usually means hatred, ill will, malevolence or animosity existing in the mind of the accused, but in the Law of homicide its meaning is much wider malice, as the work is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feature of hatred, ill will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don't proceed from and are not accompanied by any such feeling. In the law of homicide, if a man intends unlawfully to kill another, or do him some grievous bodily harm, such intention, whether accompanied by a feeling of hatred, ill will or animosity constitutes malice." (Digital Common Law. Yale edu cgi >view content.)

51. In the instant case the evidence so sufficiently establishes malice aforethought came from PW1 – Katana Katoi, PW2 – Katana Charo Kaingu and PW 3 – Dama Karisa which provided a narrative on how the deceased was initially invited to go and cleanse the patient Taabu, wife of the third accused. As this event involved the Chief of the area (PW6) and other clan elders the deceased acceded to

the invitation. PW1, PW2 and PW3 testified that the cleansing ritual went on as planned but Taabu unfortunately passed away. Upon this event taking place the third accused in company of the 1st and 2nd accused persons became upset with the deceased. At that stage PW1, PW2 and PW3 aver to the fact of the deceased being grabbed by the arm and simultaneously the beatings commenced with all manner of weapons i.e club and sticks targeting the head. What then happened are screams which attracted other relatives and residents of Matsangoni village.

52. Most of what PW1, PW2 and PW3 told the Court is corroborated by material evidence from PW4 – Stephen Juma Katana. According to his testimony, PW4 recollected that on arrival at the home of the third accused, he saw the 3rd accused arrived with a club, together with the 1st and 2nd accused joined in an assault against the deceased with the objects at hand. PW5 – Kahindi Karisa evidence also laid down before Court woven network of strong prosecution narrative which left no gaps for the accused persons to exonerate themselves that they were seeking revenge, through unlawful acts and with malice aforethought as defined in Section 203 of the Penal Code.

53. It is important to state that in the instant case each of the accused person was involved in one way or another to do the act and or omission which constitutes the offence in which they are charged. It brings into play parties to a crime as provided in Section 20 of the Penal Code. That is when an offence is committed jointly and each of the accused person is deemed to have taken part in committing the offence and are held to be guilty of the offence. Such elements on common intention and enterprise include where:

    (a). Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.

    (b). Every person who aids or abets another person in committing the offence.

    (c). Any person who counsels or procures any other person to commit the offence.

54. There is sufficient evidence from (PW2) and (PW3) that such persons include the accused persons who took wooden sticks and used them to assault the deceased which led to his death. Simply stated, under Section 21 of the Penal Code the accused person's unlawful acts and omission have been positively identified as the cause which gave rise to the crime, the fatal harm suffered by the deceased.

55. The defence of alibi crumbles against the strong and credible evidence asserted by the state in (PW2) and (PW3) testimonies that the accused were elsewhere other than the scene of the crime. To my knowledge and appraisal of the evidence, this was an afterthought which lacked specificity of details and particulars worthy of an investigation by the prosecution. In my view, there is no credible alibi that exist or existed to be availed to the accused persons.

56. True most circumstances amounts to the commission of murder but aggravated enough to bring it squarely within the element of malice aforethought. The purpose of the accused persons was meant to deprive the deceased of life and not merely to cause grievous harm.

    In R v Seme & Another {1887} 16 COX C.C. 311:

    > " The Court held interalia that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death should be murder."

57. I hold the view that not only did the accused persons bring their acts within Section 206 (1) (a) and (b) of the Penal Code but also under Sub - Section (c) dealing with knowledge that their acts or omission will cause death. It follows that the accused persons had the capacity to form the intent necessary for

the unlawful act and also from the evidence on the relevant facts that show their acts or omission was likely to cause the death of the deceased.

58. In the case of R v Upton Gutteridge {1851} 5 Cox C.C. 298 the Court of Appeal of Ontario dealing with the words knowledge to know and for stability it was held:

> “the test is whether a reasonable person with knowledge of the surrounding circumstances which make the situation dangerous to life should have foreseen that it was likely to cause death. what would a reasonable person, which is an ideal person in the community, not necessarily one of us, but what we think that a reasonable, prudent, responsible person in our society, who knew the surrounding circumstances rendering the situation dangerous, what would they have foreseen. Would they have foreseen that it was likely to cause death.”

59. In construing this interpretation, and the guidance given it keeps the prosecution case within the bounds of Section 206 of the Penal Code in such a manner that malice aforethought is proved beyond reasonable doubt. As a consequence, the accused persons formed the intent or knowledge necessary for the commission of the murder against the deceased.

60. Akin to malice aforethought in the instant case its incumbent upon the prosecution to proof common intention as traceable within the scope of Sections 21 of the Penal Code.

First, according to section 10 of the *Evidence Act*:

> “anything said, done or written by any of the persons deemed to have a common intention in reference to their common intention is relevant of such common intention.”

In Wanjiro d/o Wamario v R 22 EACA 521 the Court found that:

> “common intention developing in the course of events though it might not have been present to start with.”

61. In relation to the facts of this case the doctrine of common intention applies to both accessory before the fact and principle in the second degree on complicity and liability of the three accused persons. It flows from the evidence of PW1, PW2, PW3 and PW6 that the accused persons jointly designed and purposed to commit the unlawful act of assault against the deceased. Such act was triggered by witchcraft suspicion and the contemplated cleansing ritual incident which took place on 8.12.2016. It was within that scope thereafter the cultural cleansing ritual they will carry out the primary criminal intention of their planned enterprise of causing death or to do grievous harm. This doctrine as expounded further in the following cases:

In McAuliffe and McAuliffe {1995} 183 CLR 108 the Court held:

> “The doctrine of common intention applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design such a venture may be described as a joint criminal enterprise.”

62. That is the context of the Eastern Court of Appeal in Rex v Otieno s/o Okech & Others {1947} 14 EACA 68 said:

> “That the common intent of the applicants to kill the policeman was inferred from the association of the appellants, their discussion and the act of one of them immediately after the discussions in firing a shot at each police man.”

63. The probative value and velacity of the evidence on common intention can be deduced from the dicta in the case of Rex v Tabula Yaika s/o Kirya & three others {1943} 10 EACA where the vital element of the doctrine was pertinently stated thus:

> "That where a mob sets upon a suspected thief and beat him to death, every person forming the mob would be deemed to have joined a common intention with the rest to kill the thief and would be liable for murder."

64. In the present case, it is clear from the evidence of PW1 – PW6 that the accused persons went for the deceased at the home of the third accused armed with sticks and clubs with intent to cause him grievous bodily harm. While some of them were on guard, the other violently inflicted serious injuries to the head. While the accused persons denied any involvement with the death of the deceased there was direct evidence from PW1, PW2, PW3, PW4 and PW5 that they acted in concert in attacking him by inflicting harm across the head. The deceased died from the wounds as tabulated in the post-mortem report of Dr. Bachu of Kilifi Hospital Mortuary.

65. I am satisfied that the evidence by the prosecution meets the case of a crime executed as an incident of the common unlawful enterprise by the accused persons. The accused persons in the case before have been shown to have consciously shared a common purpose on the 8.12.2016 to coordinate the commission of the crime of murder as defined in Section 203 of the Penal Code beyond reasonable doubt.

66. Another relevant factor to this trial is that of identification of the accused persons by the witnesses as the ones who committed the murder. In the case of R v Eira Sebwato {1960} E.A 174, the holding is:

> "Where the evidence alleged to implicate the accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction. The Law regarding identification is well set out and the Courts are mandated to adhere to the procedure and great care is needed particularly where conditions are unfavourable."

67. In this regard see the principles elucidated in Wendo v R {1953} 20 EACA 166, Roria v R {1967} E.A. 583.

68. Applying the principles in the above cited authorities according to PW1, PW2, PW3, PW4 and PW5 evidence it came out clearly that they were able to identify the accused persons armed with sticks while assaulting the deceased. This was an incident that happened during the day and therefore sufficient light illuminated the scene so as to be favourable in identifying the accused persons. There was no time gap here from the time the crime was committed and arrest of the accused persons for the witnesses to loose sight of their physical features. Apart from these considerations its credible that PW1 – PW5 were conversant and familiar with the accused persons prior to the unfortunate incident of the attack and the deceased's death.

69. In the present case, I am satisfied on assessment of the evidence as I have indicated that the reception of the evidence as to recognition is correct and safe to place the accused persons at the scene.

70. From what I have said above it is apparent that the alibi defence has no ground to stand on to dispute the opportunity and presence of the accused to have set in a motion chain of events to execute the murder. The nuances of the alibi defence generated by the accused persons are of such a character incapable of credible rebuttal. The fact that there were nowhere near the locus criminis and therefore would not be expected to have killed the deceased, is neither here nor there. The murder was well planned and executed with a joint common enterprise, and malice aforethought.

71. As these questions have been extensively answered in the prosecution case without any foundational rebuttal, it behooves on me to find execution of joint plan with malice aforethought proved beyond reasonable doubt. For the above reasons, I find the accused persons guilty of murder contrary to Section 203 of the Penal Code.

72. As a consequence, each one of them stand convicted of the offence pending determination of an appropriate sentence in terms of Section 204 of the code.

Sentence

73. It is clear from the mitigating factors the convicts retain a legitimate expectation of a lesser sentence to what the Law prescribes under Section 204 of the Penal Code. I think the form of aggravating factors involved in the commission of this offence takes precedent to the mitigation offered by each of the convict. I have carefully considered the facts of the case, the mitigation and subsequent aggravating factors. In terms of the principles in Francis K. Muruatetu v R {2017} eKLR the circumstances of the offence, each of the convict participation and the disguised underlying factor of witchcraft which is never a defence in such heinous crime I sentence each of them to a term imprisonment of 35 (thirty-five) years imprisonment.

74. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER, 2020

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R. NYAKUNDI

JUDGE